

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

TYRONE WASHINGTON,

Plaintiff,

v.

WASHINGTON STATE DEPARTMENT  
OF CORRECTIONS *et al.*,

Defendants.

Case No. C05-5815RBL

REPORT AND  
RECOMMENDATION

**NOTED FOR  
March 24<sup>th</sup>, 2006**

This 42 U.S.C. § 1983 Civil Rights action has been referred to the undersigned Magistrate Judge pursuant to Title 28 U.S.C. §§ 636(b)(1)(A) and 636(b)(1)(B) and Local Magistrates' Rules MJR 1, MJR 3, and MJR 4. On January 23<sup>rd</sup>, 2006 the court ordered plaintiff to show cause why this action should not be dismissed as the action challenges the length of plaintiff's current confinement. (Dkt. # 6). Plaintiff challenges infractions as retaliatory, but he was found guilty at hearings and lost good time as a sanction. Plaintiff's response makes clear that he is indirectly challenging the loss of good time. (Dkt. # 7).

FACTS

Plaintiff challenges a number of infractions as retaliation. Plaintiff was found guilty of rule violations and lost custody and good time credits as part of the sanctions imposed. (Dkt. # 7).

A complaint is subject to dismissal prior to service when a complaint is frivolous, fails to state a claim, or contains a complete defense to the action on its face. The court may dismiss an in forma pauperis complaint

1 before service of process under 28 U.S.C. § 1915(d). Noll v. Carlson, 809 F.2d 1446, 575 (9th Cir.1987)  
 2 (citing Franklin v. Murphy, 745 F.2d 1221, 1228 (9th Cir. 1984)). A plaintiff must allege a deprivation of a  
 3 federally protected right in order to set forth a prima facie case under 42 U.S.C. §1983. Baker v. McCollan, 443  
 4 U.S. 137, 140 (1979).

5 In order to state a claim under 42 U.S.C. § 1983, a complaint must allege that (1) the conduct  
 6 complained of was committed by a person acting under color of state law and that (2) the conduct deprived a  
 7 person of a right, privilege, or immunity secured by the Constitution or laws of the United States. Parratt v.  
 8 Taylor, 451 U.S. 527, 535 (1981), *overruled on other grounds*, Daniels v. Williams, 474 U.S. 327 (1986).  
 9 Section 1983 is the appropriate avenue to remedy an alleged wrong only if both of these elements are present.  
 10 Haygood v. Younger, 769 F.2d 1350, 1354 (9th Cir.1985), *cert. denied*, 478 U.S. 1020 (1986).

11 Here, plaintiff challenges infractions and the findings of guilt that resulted in custody demotions and  
 12 loss of good time credits. The good time credits directly affect the length of time plaintiff will serve in prison.  
 13 When a person confined by the state is challenging the very fact or duration of his physical imprisonment, and  
 14 the relief he seeks will determine that he is or was entitled to immediate release or a speedier release from that  
 15 imprisonment, his sole federal remedy is a writ of habeas corpus. Preiser v. Rodriguez, 411 U.S. 475, 500  
 16 (1973). In June 1994, the United States Supreme Court held that "[e]ven a prisoner who has fully exhausted  
 17 available state remedies **has no cause of action under § 1983 unless and until the conviction or**  
 18 **sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus.**"  
 19 Heck v. Humphrey, 114 S.Ct. 2364, 2373 (1994)(emphasis added). The court added:

20 Under our analysis the statute of limitations poses no difficulty while the state  
 21 challenges are being pursued, since the § 1983 claim has not yet arisen. . . . [A] § 1983 cause of  
 22 action for damages attributable to an unconstitutional conviction or sentence does not accrue  
 until the conviction or sentence has been invalidated.

23 Id. at 2374. "[T]he determination whether a challenge is properly brought under § 1983 must  
 24 be made based upon whether 'the nature of the challenge to the procedures [is] such as necessarily to imply the  
 25 invalidity of the judgment.' Id. If the court concludes that the challenge would necessarily imply the invalidity  
 26 of the judgment or continuing confinement, then the challenge must be brought as a petition for a writ of  
 27 habeas corpus, not under § 1983." Butterfield v. Bail, 120 F.3d 1023, 1024 (9th Cir.1997) (quoting Edwards v.  
 28 Balisok, 117 S.Ct. 1584, 1587 (1997)).


1 Plaintiff has not shown his conviction has been "reversed, expunged, invalidated, or impugned by the  
2 grant of a writ of habeas corpus." Heck v. Humphrey, 114 S.Ct. 2364, 2373 (1994). At this point, the court  
3 must dismiss the plaintiff's 42 U.S.C. § 1983 claim for failure to state a claim. Accordingly, this court  
4 recommends that this action be dismissed without prejudice as plaintiff may not seek habeas relief in a civil  
5 rights action.

6 CONCLUSION

7 This action seeks to challenge the validity of sanctions imposed in disciplinary hearings which include  
8 loss of good time. The action must proceed by way of habeas with its attendant exhaustion requirement. This  
9 action must be dismissed without prejudice. A proposed order accompanies this Report and Recommendation.

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11 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal rules of Civil Procedure, the  
12 parties shall have ten (10) days from service of this Report to file written objections. *See also* Fed. R. Civ.  
13 P. 6. Failure to file objections will result in a waiver of those objections for purposes of appeal. Thomas v.  
14 Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the clerk is directed to  
15 set the matter for consideration on **March 24<sup>th</sup>, 2006**, as noted in the caption.

16  
17 DATED this 22<sup>nd</sup> day of February, 2006.

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22 Karen L. Strombom  
23 United States Magistrate Judge  
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